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Summary record of the 912th meeting

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Chairperson: Ms. Sabo (Vice-Chairperson) (Canada)

Contents

Finalization and adoption of a draft Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (*continued*)

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The meeting was called to order at 3.10 p.m.

Finalization and adoption of a draft Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (*continued*) (A/CN.9/700/Add.4-6; A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8)

A/CN.9/700/Add.4 (*continued*)

1. **The Chairperson** recalled that, at the previous meeting, it had been suggested that draft recommendation 245 might include a specific reference to a security right in intellectual property. In view, however, of the mention of the rights of a secured creditor under secured transactions law, there did not appear to be a need to make any such addition.

2. **Mr. Chan** Wah-Teck (Singapore) said that the stipulation in draft recommendation 245 that the rule in recommendation 81 (c) applied to the rights of a secured creditor and did not affect the secured creditor's rights under the law relating to intellectual property implied the existence of two distinct types of rights under the law relating to secured rights and under the law relating to intellectual property. That was not an accurate reflection of practice, since in the event of a dispute there was only a single applicable law.

3. **The Chairperson** said that the comment by the representative of Singapore was a timely reminder that the *Guide* would be read by interested parties who had not been involved in its development. It was important to note that, conceptually, the effects of the two bodies of law could be distinguished.

4. **Mr. Cohen** (United States of America) said that recommendation 81 (c), which referred to licensees' rights, not being affected by a security right in intellectual property licensed to them, had been seen as overriding rights under intellectual property law. In cases where the licensor also became a secured party through taking a security right, the licensor could rely on two sources of rights, namely, security rights as a creditor and intellectual property rights as a licensor.

5. The intent of draft recommendation 245 was to make it clear that even though recommendation 81 (c) provided a licensee with protection against the holder of a security right, it would be beyond the scope of the *Guide* to undermine the rights of a licensor under intellectual property law. Draft recommendation 245 thus placed limits on recommendation 81 (c). The two recommendations in conjunction meant that secured transaction rights had no effect on intellectual property rights.

6. **The Chairperson** noted that the distinction between secured transaction and intellectual property rights was further developed and explained throughout the *Guide*.

7. **Mr. Chan** Wha-Teck (Singapore) asked whether, since draft recommendation 245 was for legislation to be enacted, it was to be understood as prescribing that any law to give effect to recommendation 81 (c) must be subject to an exception in respect of rights arising out of intellectual property law.

8. **Mr. Cohen** (United States of America) said that a great deal would depend on how the law was drafted. The effectuation of recommendation 81 (c) might be so narrowly defined as not to limit intellectual property rights.

9. **Mr. Weise** (Observer for the American Bar Association) said that, in practice, the rights of a secured creditor under intellectual property law would not be affected by recommendation 81 (c).

10. *A/CN.9/700/Add.4, as orally amended, was adopted.*

A/CN.9/700/Add.5

11. **Mr. Bazinas** (International Trade Law Division) said that, in the second line of the note to the Commission following paragraph 47, "paragraphs 45-48" should be replaced by "paragraphs 44-47". The proposed replacement text would recognize that a licensor of intellectual property subject to specialized registration might have priority over the licensee and thus obtain the benefits of an acquisition secured creditor by virtue of the nature of the transaction and the intellectual property involved.

12. The proposed revision stated that when a party registered a transfer or a licence that party could also register a security right in the intellectual property to secure any outstanding payment obligation; a secured creditor of a transferee or licensee could only register subsequently and would thus have a security right that was subordinate to that of the transferor or licensor.

13. **Mr. Macdonald** (Canada) said that a main concern in the *Guide* was to place all acquisition financiers in the same relative position and to permit

lenders financing an acquisition to obtain an acquisition security right of the same order as a vendor. In the suggested replacement text the equivalent of an acquisition security right would accrue to the licensor simply because of how the registry operated, so that the licensor would always have a right superior to that of a general financier. Yet the situation of a lender acquisition financier, who did not benefit from the priority accruing to the licensor, was not addressed.

14. **Mr. Bazinas** (International Trade Law Division) said that the alternative text was intended to cover the obtaining of an acquisition security right by both vendors and lenders; the formulation "*A registers a transfer or licence to B on credit, A registers a security right in the intellectual property to secure any outstanding payment obligation*" did not mean that a lender who financed the acquisition of a licence or an asset by B did not benefit from the priority position of an acquisition financier. The main point, as set out in the final sentence, was that the application of the principles of an acquisition security right for intellectual property needed only apply in cases where a security right in the intellectual property was subject to registration in the general security rights registry recommended in the *Guide*.

15. **Mr. Cohen** (United States of America) said that the note to the Commission was premised on the consideration that, since the acquisition financier already had priority, it would be superfluous for super-priority rule to apply. However, the note presupposed a specialized registry which, by being asset-specific, did not allow pre-registration, although there existed in the world various types of specialized registries of which that was not true, so that the consideration expressed in the note was true only of a subset of registries, and the super-priority rule might not be superfluous in all cases.

16. The Working Group had been very careful not to specify how various specialized registries worked given that they operated in different ways, and, in particular, in view of recommendation 4 (b), not to make assumptions about how a specialized intellectual property registry would work. Since the Commission could not anticipate how specialized registries would develop, his delegation would prefer not to drop the rule relating to acquisition financing merely because it was unnecessary in contexts today. The original paragraphs should be retained.

17. **The Chairperson** said that she took it that the Commission wished paragraphs 44 to 47 to remain unchanged and not to be replaced by the proposed alternative text.

18. **Mr. Bazinas** (International Trade Law Division) said that the question was whether the text as it stood, particularly the second sentence of paragraph 44, accurately reflected the situation. The United States delegation had noted that the proposed replacement text rested on an assumption that might be unfounded in some cases, but that could also be said about the original text. The solution was perhaps not to replace paragraphs 44 to 47 altogether but to revise them, especially the second sentence of paragraph 44, so as to ensure that the approach envisaged in the *Guide* did not create an obstacle to acquisition financing in cases where a specialized registry allowed pre-registration.

19. **Mr. Weise** (Observer for the American Bar Association) said that the task of identifying for the purpose of the *Guide* a set of rules applicable to acquisition financing similar to those applying to other encumbered assets had been very difficult because of the complexity of the subject matter. It was uncertain whether the procedure set out in the alternative text would work, and it would be risky to revisit the issue. In any event, nothing in the *Guide* would affect the law of intellectual property or the operation of specialized registries.

20. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) concurred on the need for caution. The original text set out the reasons for the adoption of provisions on acquisition financing rights in respect of intellectual property. Paragraph 43 said that the acquisition financing rules in the *Guide* did not supersede priority rules in specialized registries. One reason for the suggested text was the existence of specialized intellectual property registration systems in which the priority rules permitted an acquisition financing right. The text aimed at providing the same result where only a general security rights registry applied. There was no intent to describe the functioning of all registries or to limit their development.

21. **The Chairperson** said that she took it that the Commission wished to adopt the existing text.

22. **Mr. Bazinas** (International Trade Law Division) said that he wished to confirm that the Commission wished to retain the essence of paragraph 44, since it felt that the approach taken in the *Guide* could create

an obstacle to acquisition financing to the extent it did not allow acquisition financing priority with respect to security rights registered in an intellectual property registry, and that as a result States might wish to extend the special priority status of an acquisition security right to rights registered in an intellectual property registry. In his view, the paragraph was not accurate, as it was based on assumptions that might not be correct.

23. **The Chairperson** said that the Commission would suspend its consideration of document A/CN.9/700/Add.5 pending informal consultations.

A/CN.9/700/Add.6, chapters XI and XII

24. **Mr. Bazinas** (International Trade Law Division) referred the Commission to the report of Working Group V on insolvency (A/CN.9/691, para. 96), which had proposed the following addition to paragraph 64 of document A/CN.9/700/Add.6, dealing with clauses that automatically terminated and accelerated a contract upon application for commencement:

> "The commentary to the *Insolvency Guide* explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115 of the *Insolvency Guide*."

25. **The Chairperson** said that she would take it that the Commission wished to adopt the proposed amendment.

26. *It was so decided.*

27. *A/CN.9/700/Add.6, chapters XI and XII, as orally amended, were adopted.*

The meeting was suspended at 4 p.m. and resumed at 4.35 p.m.

A/CN.9/700/Add.5 (continued)

28. **The Chairperson** invited the Commission to comment further on paragraphs 44 to 47 of document A/CN.9/700/Add.5, and the related note to the Commission following paragraph 47.

29. **Mr. Macdonald** (Canada) said that the existing wording of paragraphs 44 to 47 was sometimes unclear in expressing certain key considerations. The first consideration was that the regime of acquisition financing in the *Guide* was inspired by the general security rights registry. It failed to take account of any specialized registries, including intellectual property registries, or the priority principles developed in those specialized registries. As made clear in recommendation 4 (b), the *Guide* did not seek to specify how any individual intellectual property registry should be organized, or what priority it should establish.

30. The second consideration was that, in a State with an intellectual property registry permitting registration against future assets but lacking specialized rules for acquisition financing, the application of the default "first-to-register" rule would result in the acquisition financier ranking second in terms of priority. It was that situation that paragraphs 44 to 47 of the draft Supplement were seeking to explain. The alternative wording proposed in the note to the Commission usefully added that in the event of such a situation, the acquirer's rights could not be registered until after the seller's rights had been registered.

31. Paragraphs 44 to 47 of the draft Supplement served to illustrate the *Guide*'s recommendation to States to consider establishing a system of acquisition financing, and to emphasize that there was a difference between the logic of general security rights registries and specialized intellectual property rights registries, particularly with regard to priority of rights.

32. **The Chairperson** said that the Commission seemed to take the view that the note to the Commission following paragraph 47 of document A/CN.9/700/Add.5 raised an issue that should be addressed in the draft Supplement and that the alternative wording in the note should not in fact replace, but rather be added to, paragraphs 44 to 47. She took it that the Commission wished to retain paragraphs 44 to 47 of document A/CN.9/700/Add.5, and to entrust to the secretariat the task of adding the text of the note to the existing text and making the necessary editorial changes.

33. *It was so decided.*

34. *A/CN.9/700/Add.5, as orally amended, was adopted.*

A/CN.9/700/Add.6, chapter X

35. **The Chairperson** said that deciding on the wording of draft recommendation 248, contained in chapter X, section B, regarding the law applicable to a security right in intellectual property was made complex by the fact that practitioners involved with secured transactions and practitioners involved with intellectual property approached the issue from different standpoints. Aware of those opposing views, the Working Group had developed options A to D in document A/CN.9/700/Add.6, while members and observers had presented additional options in documents A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8. The Commission could discuss the options and, in the light of its decision, determine whether to alter the related commentary.

36. **Mr. Bazinas** (International Trade Law Division) recalled that the law applicable to contractual matters had been successfully addressed in recommendation 216 in the *Guide* and paragraphs 53 and 54 of document A/CN.9/700/Add.6. The same was true of the law applicable to the intellectual property itself, as the Working Group, having explored the interaction between the law on secured transactions and intellectual property law, had determined that the *Guide* should not concern itself with intellectual property law at all. That mirrored the approach taken by the Commission to laws applicable to all other types of asset, such as intangible assets.

37. Option A in document A/CN.9/700/Add.6 was based on the consensus in the community of intellectual property practitioners that intellectual property rights were subject to national treatment. As a consequence, the law applicable to ownership of intellectual property should be the law of the State in which protection of that property was ensured, and by extension, the same was true for security rights in intellectual property, including in cases where the ownership rights of a transferee were at issue.

38. However, the Working Group had noted that in a transaction involving a multiplicity of intellectual property rights used as collateral for credit, application of a rule referring to the law of the protecting State would result in parties having to meet the requirements for creation, third-party effectiveness, priority and enforcement of multiple jurisdictions. That would increase the complexity and cost of the transaction and go against the overall objective of the *Guide*, which was to facilitate access to secured credit at lower cost.

39. The Working Group's goal was to find a compromise between the application of the law of the protecting State and the application of the law of the grantor's location. The latter was the *Guide*'s general rule for intangible assets. Option B focused on establishing an exception to the general rule of the applicable law being the law of the grantor's location. That exception was that third-party effectiveness and priority of a security right as against the security right of a transferee or licensee would normally be subject to the law of the protecting State.

40. Option C made a distinction between intellectual property that could be registered in a specialized registry and intellectual property that could not be so registered. The main rule for the first type would be application of the law of the protecting State, while the enforcement of a security right relating to such intellectual property would be covered by the law of the grantor's location, on the understanding that enforcement — which involved several acts — fell under one State's law rather than several States' laws. In the case of the second type, creation and enforcement of a security right would be covered by the law of the location of the grantor, while effectiveness against third parties and priority of a security right relating to such intellectual property would be covered by the law of the protecting State. The Commission might wish to note the discussion in paragraphs 25 and 26 of document A/CN.9/700/Add.6 of the advantages and disadvantages of option C.

41. Option D applied limited party autonomy to the creation and enforcement of a security right. If the law applicable to such issues was the law of the protecting State, the parties could agree to apply the law of the grantor's location, and vice versa. The associated commentary, particularly paragraphs 30, 46 and 52 of document A/CN.9/700/Add.6, indicated the problems with that approach. The law applicable to effectiveness against third parties and priority of a security right in intellectual property as against the rights of a transferee, licensee or another secured creditor would be the law of the State of protection, while the law applicable to effectiveness against third parties and priority of a security right in intellectual property as against the rights of all other competing claimants

would be that of the grantor's location. The primary example of such a claimant was an insolvency administrator.

42. The note to the Commission following option D sought to help with the choice of option, taking account of the fact that the components of the "hybrid" approaches, B to D, were not mutually exclusive. He drew attention to its penultimate paragraph, which indicated that, if the forum did not recognize the assignment of a copyright made under a foreign law, the transaction could be "salvaged" by classifying it as something that the forum did recognize, for example, as an exclusive licence — what was termed, in the context of conflict of laws, an "accommodation rule". He also drew attention to the final paragraph of the note, which indicated the possible relevance to the Commission's discussions of the work of other organizations. However, the concrete example given, that of the European Max-Planck Group for Conflict of Laws in Intellectual Property, was different from that of the Commission in three important ways. First, the text which the Group was developing was broader in scope than the *Guide*, in that it dealt with the law applicable to the intellectual property right itself. Second, it did not refer to creation, third-party effectiveness, priority and enforcement, but instead used detailed, neutral language that better accommodated the coverage of different issues by different laws and largely avoided problems of characterization. Third, the Group did not address the law applicable to intellectual property in the case of insolvency of the grantor, as that was already covered by existing European Union legislation.

43. **Mr. Weise** (Observer for the American Bar Association) said that the proposal by the Permanent Bureau of the Hague Conference on Private International Law, the Commercial Finance Association and the American Bar Association, contained in document A/CN.9/XLIII/CRP.7, was inspired by the twin guiding principles underlying the development of the draft Supplement to the *Guide*, namely to accommodate the policy interests of the intellectual property and secured transactions fields. The major concern in the former was to protect the rights of intellectual property rights holders. The major concern in the latter was to provide mechanisms for transparent, efficient, low-cost, secured financing. In many cases, the proposal deferred to the general rule in the *Guide*, which was to apply the law of the grantor's location to intangible assets, deeming that to be important for the public policy goals relating to secured transactions while having little or no effect on the protection of intellectual property rights.

44. A key inspiration of the options in the proposal, labelled E and F, was the work of the European Max-Planck Group for Conflict of Laws in Intellectual Property and the Permanent Bureau of the Hague Conference on Private International Law, both of which had a strong interest in conflict of laws and private international law, but neither of which had a direct interest in secured transactions or intellectual property.

45. Options E and F both indicated that, where a question of property interests arose, the law of the State of protection (*lex protectionis*) should apply. However, where the question focused on secured transactions, and could be addressed without interfering with intellectual property interests, the law of the grantor's location should apply. Accordingly, questions such as whether and how a security right could be created were referred to the law of the State in which the intellectual property was protected. Questions such as determining whether or not notice must be served on a grantor, what that notice must say and how far in advance it must be served, whether a security agreement must be signed, and whether encumbered assets must be described, were referred to the law of the grantor's location.

46. Questions regarding the registration and transferability in a foreclosure sale of an encumbered asset (in the present case, intellectual property), were referred to the law of the State of protection. The law of the State of protection was also the applicable law in the case of effectiveness against third parties and priority, provided that the intellectual property could be registered in a specialized registry. If it could not be so registered, in the event of a dispute between two secured creditors or between a secured creditor and the insolvency administrator, the law of the grantor's location would apply.

47. **Mr. Deschamps** (Canada), introducing his delegation's proposed compromise text of recommendation 248 (A/CN.9/XLIII/CRP.8), noted that the first sentence set out the rule and the second sentence the option available to a secured creditor. It made the *lex protectionis* the applicable law in all major areas but it gave secured creditors the option to

use the law of the grantor's location to protect themselves against insolvency administrators and unsecured creditors. The same approach had been taken in the *Guide* in recommendations 210 and 211 on conflict-of-laws rules relating to bank accounts. Both the proposal set out in document A/CN.9/XLIII/CRP.7 and Canada's own made no distinction between registrable and non-registrable interests, and therefore the Canadian proposal always allowed the secured creditor to rely on the *lex protectionis*, especially where the transaction was asset-specific.

48. **Mr. Bazinas** (International Trade Law Division) asked, in the case of a secured creditor that used the option to create a security right in intellectual property under the law of the grantor's location, what law would apply to priority and enforcement of that right. If the *lex protectionis* applied, how would third-party effectiveness be separated from priority and from enforcement?

49. **Mr. Deschamps** (Canada) said that under Canada's proposal, the *lex protectionis* would apply to enforcement in all circumstances. The proposal had not specified a law applicable to priority issues because priority did not arise with respect to an insolvency administrator. Under the draft Supplement, once a security right was effective against an insolvency administrator, the secured creditor had priority, as it also did against unsecured creditors. Priority issues arose only between secured creditors. All other priority issues fell under the *lex protectionis*. However, that did not defeat the right of a secured creditor that had made its right effective against an insolvency administrator under the law of the grantor's location. Canada's proposal could be tweaked to encompass the other approach, but he himself did not think that was needed.

50. **Mr. Umarji** (India) asked how option F in the proposal introduced by the observer for the American Bar Association could make two different laws applicable to the enforcement of a security right in intellectual property: the enforcement itself was governed by the law of the grantor's location, but the sale of the intellectual property was governed by the law of the protecting State. Normally enforcement included the right to sell.

51. **Mr. Weise** (Observer for the American Bar Association) said that the goal was to bring enforcement under the law of a grantor's location because otherwise notice would have to be given under the law of each State involved and necessitate multiple enforcement procedures, with the result that not even a willing buyer could buy the entire package of encumbered assets at one time. The thinking had been that a secured creditor conducting a foreclosure sale preferred to have only one foreclosure disposition and, if necessary, go on to figure out what property limitations there were, rather than having the costly burden of conducting multiple dispositions in each separate State. That also enhanced the prospect of getting more money for the encumbered asset, which was good for the grantor, the secured creditor and other creditors of the grantor.

52. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that the simultaneous application of the two sets of laws was a common occurrence. In practical terms, the secured creditor would seek to enforce its secured credit rights according to the law of the grantor's location when it held an enforcement sale. Once the sale was complete, the purchaser of the rights would have to take the necessary steps to make its ownership rights effective against third parties under the assignment and transfer provisions of the law of the protecting State.

53. The enforcement and assignment provision singled out by India was illustrative of why his organization was a proponent of the proposal in document A/CN.9/XLIII/CRP.7. The proposal was not a matter of pure compromise, but offered the only approach that gave deference to both sets of laws by applying their underlying principles and taking into account how the laws affected the secured credit interests and the intellectual property interests in the place where they were centred.

54. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that he saw some common areas of substantive agreement in the various proposals, especially those set out by the American Bar Association and Canada, the latter having the benefit of simplicity. In the area of insolvency, for instance, a secured creditor should in fact be able in some circumstances to rely on the law of the grantor's location to establish priority against an insolvency representative. The Canadian proposal seemed to apply to a broader class of registered and unregistered intellectual property, and it was not clear how the *UNCITRAL Legislative Guide on Insolvency Law* would resolve that issue, but the Working Group should be able to find consensus in the area of insolvency.

55. In the area of enforcement, the kind of situations astutely analysed by the observer for the Commercial

Finance Association were very common in intellectual property law, where assignments made under judgements or arbitral awards in one country often had to be enforced elsewhere; and whether such transfers were recognized in that other country depended upon the application of the local laws, in other words, on the *lex protectionis*. Perhaps further discussion was needed on the mixed nature of the security right, which had a unifying contractual component and an intellectual property component. While the *Guide* tended to see intangibles as accounts, which were contract rights to be governed by a unifying law, intellectual property was a property right and therefore had effects against third parties that did not exist in the abstract but were based on the law of the protecting country where they were enforced; and enforcement necessarily governed effectiveness and priority. In that connection, the distinction between security rights registered or unregistered in a local intellectual property registry would have to be clarified.

56. Further discussion was also needed on the transactional rules governing all-asset transactions that offered simplicity for the lender, as against transactions involving complex chains of title governed by many different laws. The two kinds of transactions had to be balanced in the intellectual property world, which was governed by the *lex protectionis*.

57. **Mr. Riffard** (France) asked why the *lex protectionis* was made to apply to priority in the area of insolvency. He observed that Canada's proposal had the benefit of simplicity. At any rate, France was non-negotiably opposed to option A (A/CN.9/700/Add.6, p. 16), which made the *lex protectionis* applicable to enforcement.

58. **Mr. Cohen** (United States of America) said that he did not see that the Canadian rule was like the treatment of bank accounts in the conflict-of-laws rules. Also, when Canada stated that it was sufficient to have third-party effectiveness governed by the law of the grantor's location and to have the *lex protectionis* apply to priority, that in itself was a priority rule that might not apply in all States. The relative rights of the insolvency administrator and the secured creditor might be different in protecting States, and he believed that a conflict-of-laws provision was indeed necessary.

59. He was, furthermore, puzzled by the Canadian proposal with regard to enforcement. The issue as the United States saw it was which set of rules would govern the process by which the secured creditor enforced its security right. The separate enforcement dispositions required for an encumbered asset protected under the law of different States would make the collateral less valuable not only to the secured creditor but especially to the grantor. He would like some explanation of why the Canadian approach was advantageous, when the goal of the *Guide* was to make more credit available on the basis of intellectual property rights.

60. **Mr. Sato** (Japan) said that his delegation had originally supported option C in document A/CN.9/700/Add.6, but now hoped that there would be a consensus on either option E or option F in document A/CN.9/XLIII/CRP.7.

61. **Mr. Deschamps** (Canada) explained that his proposal allowed the secured creditor to make its security right effective against the insolvency representative under the law of the grantor's location but not to obtain priority over the representative because third-party effectiveness necessarily entailed recognition of the security right against the insolvency administrator and the question of priority did not arise. The priority provisions in the *Guide* always framed the concept of priority in terms of a conflict of competing secured creditors. He was aware that the United States conception of third-party effectiveness might need to be supplemented by a concept of priority and he would have no difficulty in referring to the question of priority, which would be covered by either set of laws.

62. He would for the moment set aside the issue of bank accounts because it was not one of his central arguments. Regarding the question of enforcement, the Canadian proposal had aimed to rally the representatives of the intellectual property community. Since they usually preferred the law of the grantor's location to apply to enforcement, he would be ready to reopen the discussion on that point.

63. **Mr. Siebrasse** (Observer for the Independent Film and Television Alliance) observed that the Canadian proposal had two advantages: it was the simplest and it allowed a single registration in the location of the grantor to beat the insolvency administrator. In that respect it was more attractive than the proposal introduced by the American Bar Association because it covered patents and trademarks as well as copyrights. He believed the proposal was very sound in principle.

The meeting rose at 6.05 p.m.